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No. 88-1958

In The

Supreme Court of the United States

October Term, 1988

SUPREME BEEF PROCESSORS, INC.,

Appellant,

v.

ROBERT YAQUINTO, JR., TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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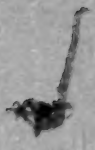

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statutes Involved 1

Statement of the Case 2

Reasons Why Writ Should Be Denied 3

A. Summary of Argument 3

B. Collection of Undercharges by a Motor Carrier as Required by the Interstate Commerce Act Cannot Constitute an Unreasonable Practice, and Does Not Fall within the Primary Jurisdiction of the Interstate Commerce Commission 5

1. Standard of Review 5

2. Statutory Foundation 6

3. Authority from this Court 6

4. Courts of Appeal Decisions 10

5. *Seaboard* Consistent with Decision Below 10

6. *Western Pacific* Consistent with Decision Below 12

7. Cases Omitted by Petitioner 12

C. Government Exemption Claim Unavailing 14

Conclusion 15

TABLE OF AUTHORITIES

Page

COURT CASES:

A.,T. & S.F. Ry Co. v. Robinson, 233 U.S. 173 (1914) 16

Buckeye Cellulose Corp. v. L & N Railroad Company, 1 I.C.C.2d 767 (1985), *Aff'd Sub. Nom. Seaboard System Railroad v. United States*, 794 F.2d 635 (11th Cir. 1986) 4, 10, 11

Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 52 S.Ct. 443, 76 L.Ed. 815 (1932) 16

Consolidated Freightways v. Terry Tuck, Inc., 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980) 10

Empire Petroleum Co. v. Sinclair Pipeline Co., 282 F.2d 913 (10th Cir. 1960) 10, 16

Frito-Lay of Puerto Rico, Inc. v. Canas, 92 F.R.D. 384 (D.P.R. 1981) 15

Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Company, 586 F.2d 588 (5th Cir. 1978) 10

Jensen v. Conrad, 570 F.Supp. 114 (D.S.C. 1983), *cert. denied*, 470 U.S. 1052, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985) 15

Johnson v. Heckler, 607 F.Supp. 875 (N.D.Ill. 1984) 14

Keogh v. Chi. & N.W.R. Co., 260 U.S. 156, 43 S.Ct. 47 (1922) 16

Louisville and Nashville Railroad Co. v. Central Iron and Coal Co., 265 U.S. 59, 44 S.Ct. 441, 68 L.Ed. 900 (1924) 3

Louisville and Nashville Railroad Co. v. Maxwell, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915) 6

Louisville and Nashville Railroad Co. v. Mead Johnson and Company, 737 F.2d 683 (7th Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 320 (1984) 10

TABLE OF AUTHORITIES – Continued

Page

Miller v. Ideal Cement Co., 214 F.Supp. 717 (D.Wyo. 1963) 16

Nyad Motor Freight, Inc. v. W. T. Grant Co., 486 F.2d 1112 (2d Cir. 1973) 10

Regular Common Carrier Conference, et al. v. United States, 793 F.2d 376 (D.C.Cir. 1986) 13, 14

Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982) 7, 13

Southern Pacific Transportation Co. v. Miller Abattoir Co., 454 F.2d 357 (3rd Cir. 1972) 10

Southern Pacific Transportation Co. v. San Antonio, Texas, 748 F.2d 266 (5th Cir. 1984) 10

Square D Co. and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau, et al., 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986) 8, 9, 16

Thermo King v. Strick Corp., 467 F.Supp. 75 (W.D.Pa.), *Aff'd*, 609 F.2d 503 (3rd Cir. 1979) 15

Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983) 7

United States v. Western Pacific Railroad Co., 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956) 4, 12

STATUTES

49 U.S.C. §10701 9

49 U.S.C. §10761(a) 1, 3, 4, 6

49 U.S.C. §10762 ..... 1, 3, 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

U.S. Constitution, Article I, Section 8, Clause 3..... 2

Federal Rules of Civil Procedure, Rule 59..... 14

Supreme Court Rules, Rule 17(a).....4, 5

MC-177, *National Industrial Transportation League, Petition to Institute Rulemaking* 9

House Report 96-1069, 96th Cong. 2nd Sess. 12, reprinted in 1980 *U.S. Code, Cong. and Admin. News* 2282, 2307 10

STATUTES INVOLVED

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

§ 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle . . .

STATEMENT OF THE CASE

Prior to the filing of its bankruptcy, Caravan Refrigerated Cargo, Inc. ("Caravan") was a motor common carrier for hire operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission ("ICC"). Caravan operated under Title 49 of the United States Code which governs transportation in interstate commerce. Congress has preempted and exclusively regulates the field of interstate commerce pursuant to United States Constitution Article I, Section 8, Clause 3. Congress has passed statutes, from time to time, relating to transportation and now recodified in Title 49 U.S.C. as Sections 10101, *et. seq.*

Robert Yaquinto, Jr. ("Trustee") constitutes the duly qualified and legally appointed trustee for the Caravan bankruptcy estate. The Trustee is required to collect all assets of the estate and distribute the same in accordance with the bankruptcy code priorities. In fulfillment of those responsibilities, Trustee filed suit to collect sums due from Supreme Beef Processors, Inc. ("Petitioner") by filing an adversary action in the Bankruptcy Court on August 29, 1985. Ultimately, the adversary action was transferred to the District Court for the Northern District of Texas where the Honorable Jerry Buchmeyer, District Judge, upon cross-motions for summary judgment, the first of which was filed by Petitioner, granted summary judgment in favor of Trustee and against Petitioner. Petitioner's request for reconsideration in the District Court was denied.

Petitioner appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit rendered its opinion on February 2, 1989, unanimously affirming the decision of the District Court. Upon request by Petitioner for rehearing or *en banc* consideration, the Fifth Circuit unanimously rejected any further consideration, denied rehearing and denied *en banc* consideration. Petitioner now seeks a writ of certiorari from this court to review the final opinion of the Fifth Circuit.

REASONS WHY WRIT SHOULD BE DENIED

A. Summary of Argument

This matter presents a simple, straightforward negotiated rate case. Caravan quoted and billed and Petitioner paid sums for interstate transportation which were not in accordance with rates duly on file with the ICC. Pursuant to the judgment of the District Court and affirmed by the Fifth Circuit, Trustee is entitled to recover the undercharges. The statutes mandate that a common carrier charge and collect only the tariff rate. This long-established, well-entrenched doctrine is often referred to as the "Filed Rate Doctrine" or "Filed Tariff Doctrine". The Filed Rate Doctrine has often been recognized by this court. In 1924 this Court reiterated the Filed Rate Doctrine in *Louisville and Nashville Railroad Co. v. Central Iron and Coal*, 265 U.S. 59, 44 S.Ct. 441, 68 L.Ed. 900 (1924). The Filed Rate Doctrine is based upon the provisions of the Interstate Commerce Act which are now found at 49 U.S.C. 10761(a) and 10762. This court has never altered its view that the Filed Rate Doctrine compels payment of the tariff charges under any circumstances. Likewise, the statutory

foundation for the Filed Rate Doctrine has never been changed. In fact, when Congress carefully reexamined this area of the law in 1980, the Filed Rate Doctrine was reenacted as Section 10761(a). No Circuit Court of Appeals has ever ruled that the Filed Rate Doctrine should be held subservient to a quoted or negotiated rate.

Although not explicitly, Petitioner apparently relies upon Supreme Court Rule 17(a) in seeking certiorari. Petitioner asserts that there is a conflict among the circuits based upon the decision in *Buckeye Cellulose Corp. v. L & N Railroad Co.*, 1 I.C.C.2d 767 (1985), *Aff'd Sub. Nom. Seaboard System Railroad v. United States*, 794 F.2d 635 (11th Cir. 1986) ("*Seaboard*"). Petitioner also asserts an inconsistency with this court's ruling in *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956).

Petitioner incorrectly asserts that there is a conflict with the *Seaboard* case. As the Fifth Circuit indicated, the *Seaboard* case is not a case of a quoted rate versus a published rate, but instead, a case of two rates which were published in a tariff, but unclear to the ordinary user. Therefore, the higher rate could not be used under the rule of construction that ambiguity or unclarity in the tariff shall result in application of the lower rate.

Likewise, this court's ruling in *Western Pacific* is not inconsistent with the Filed Rate Doctrine. This court held in *Western Pacific* that the ICC's primary jurisdiction must be invoked where technical issues are involved. In *Western Pacific*, the specific commodity being shipped was not listed in any tariff. Thus, the technical expertise of the

ICC was required to determine which of two similar, though not exact, commodity descriptions should apply to those shipments.

Petitioner also relies upon a purported exception for government traffic. The district court and Court of Appeals both correctly rejected that argument for two reasons. First, the argument was not timely raised. Second, on its merits, the argument fails for lack of factual support.

Lacking any conflict among the circuits, certiorari should be denied.

B. Collection of Undercharges by a Motor Carrier as Required by the Interstate Commerce Act Cannot Constitute an Unreasonable Practice, and Does Not Fall within the Primary Jurisdiction of the Interstate Commerce Commission.

1. Standard of Review

In determining whether certiorari should be granted, this court's standard is embodied in Rule 17. The only portion of that rule which is potentially applicable, based upon Petitioner's brief, is contained in Subsection (a) regarding a conflict among the circuits. As will be shown below, no conflict among the circuits exists, and thus certiorari must be denied.

Petitioner's brief in its first two questions presented, essentially raises one question. That question is more appropriately stated above. The ICC may not, under the guise of primary jurisdiction, overrule the Filed Rate Doctrine on a case-by-case basis.

2. Statutory Foundation

Pursuant to its Constitutional authority, the Congress has occupied and preempted the field of interstate commerce regulation. Congress has exercised its authority by passage of the Interstate Commerce Act, including Sections 10761(a) and 10762. Those sections form the foundation of the Filed Rate Doctrine. Section 10761(a) provides as follows:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. *That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.* (Emphasis added.)

Section 10762 provides, in pertinent part, as follows:

> . . . A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle.

These sections and their predecessor sections, require that a carrier charge and collect only those amounts which are contained in the tariff.

3. Authority from this Court

In the seminal case on this issue, *Louisville and Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915), this court specifically stated that

"deviation from it [the tariff] is not permitted upon any pretext". 35 S.Ct. at 495. This court acknowledged that harsh results may sometimes occur, and that unfairness may seem to result, however, the rule of law is established by Congressional enactment and this court has affirmed that rule of law.

In more recent years, this court has considered the Filed Rate Doctrine in several other contexts. For example, in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982), this court considered deviation from credit regulations as a defense to a carrier's suit for collection of its full tariff charges. This court there held that *no* action on the part of the carrier could prevent collection of the tariff charges and affirmed the Filed Rate Doctrine, stating as follows:

> It is perhaps appropriate to note that a carrier has not only the right but also the duty to recover its proper charges for services performed.

102 S.Ct. at 1821. Thus, the carrier's violation of regulations provided no defense to the shipper. The tariff rate must be paid. Policing the carrier is up to the ICC's administrative arm. 102 S.Ct. at 1823-4.

A year later, this court considered the Filed Rate Doctrine in a slightly different context. In *Thurston Motor Lines, Inc. v. Jordan K. Rand., Ltd.*, 460 U.S. 533, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983), this court considered the jurisdictional foundation for an action to collect undercharges (identical to Trustee's claim). This court reasoned that an action to collect undercharges, being based upon the statutes previously cited herein, constitutes a federal

question, and *not* a contract action. This fact is extremely important. This court found that the charges are *not* a matter of contract, but instead, are a matter of law which apply regardless of any understandings to the contrary, be they reasonable or not. Thus, this court again confirmed the superiority of the Filed Rate Doctrine over any "agreed" or "negotiated" rate.

Most recently, this court considered the Filed Rate Doctrine in the context of antitrust exemption in *Square D Co. and Big D Building Supply Corp. v. Niagara Frontier Tariff Bureau, et al.*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986). In *Square D*, this court considered whether a collective rate bureau remains exempt from antitrust authority in light of the 1980 Amendments to the Interstate Commerce Act. After reviewing the longstanding notions of collective rate-making, non-discriminatory pricing and the Filed Rate Doctrine, this court concluded that the changes to the Interstate Commerce Act were not intended to liberalize, modify, annul, waive, or in any way dilute or limit the long-standing interpretation of the law. This Court stated as follows:

> . . . it nevertheless remains true that Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and that Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. *Petitioners have pointed to no specific statutory provision or legislative history indicating a specific Congressional intent to overturn the long-standing Keogh construction; harmony with the general legislative purpose is inadequate for that formidable task.* (emphasis added).

106 S.Ct. at 1928-29.

Petitioner's argument actually conflicts with this Court's ruling in *Square D*. This Court found a "statement of general legislative purpose inadequate for . . . (the) formidable task" of overruling long-settled policy. *Square D*, 106 S.Ct. at 1928-29. Petitioner's argument relies upon the ICC's self-annointed, expanded area of involvement. *See*, MC-177, *National Industrial Transportation League, Petition to Institute Rulemaking*. That expansion relies upon nothing but a general statement of legislative purpose (49 U.S.C. 10701). The foundation of Petitioner's argument should consist of concrete and steel. Instead, Petitioner's argument and its foundation crumble for lack of substantial footing. In reality, the ICC has bootstrapped its authority by choosing to declare the Filed Rate Doctrine invalid, on a case-by-case basis, pursuant to a general statement of purpose, the very activity this Court declared improper only three (3) years ago.

In fact, this court's uniform interpretation of the Filed Rate Doctrine parallels Congressional intent as expressed in 1980 when the Interstate Commerce Act was revised. In debating the revisions to the Interstate Commerce Act, Congress expressed its intent as follows:

> The thrust of (the new zone of rate freedom subsection) . . . is to provide for more pricing freedom and less government regulation and to balance freer entry into the industry, freer expansion of the industry, and the additional competition that will result from other provisions of the bill. The concept, then, is to spur competition both in service and in pricing . . .
>
> This new latitude carries with it less government involvement, *except in the area of discriminatory and predatory pricing*. In these two areas the Commission's powers remain intact. (emphasis added).

See, House Report 96-1069, 96th Cong., 2nd Sess. 12, reprinted in 1980 *U.S. Code, Cong. and Admin. News* 2282, 2307.

4. Courts of Appeal Decisions

The Circuit Courts of Appeal have all consistently followed this Court's lead in applying the Filed Rate Doctrine. *See, e.g., Nyad Motor Freight, Inc. v. W. T. Grant Co.*, 486 F.2d 1112 (2nd Cir. 1973); *Southern Pacific Transportation Co. v. Miller Abattoir Co.*, 454 F.2d 357 (3rd Cir. 1972); *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Company*, 586 F.2d 588 (5th Cir. 1978); *Southern Pacific Transportation Co. v. San Antonio, Texas*, 748 F.2d 266 (5th Cir. 1984); *Louisville and Nashville Railroad Co. v. Mead Johnson and Company*, 737 F.2d 683 (7th Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 320 (1984); *Consolidated Freightways Corp. v. Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980); *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F.2d 913 (10th Cir. 1960).

In *Consolidated Freightways* and *Mead Johnson*, this court denied certiorari. No reason existed for review of those cases, nor does any reason exist for review of this case.

5. *Seaboard* Consistent with Decision Below.

Petitioner argues that the Eleventh Circuit ruling in *Seaboard* conflicts with the Fifth Circuit's decision. Petitioner misses the point of *Seaboard*. As the Fifth Circuit opinion stated, the *Seaboard* case in fact is quite consistent with the Fifth Circuit opinion.

The Filed Rate Doctrine assumes that a rate is published which any shipper might check for its validity. The Eleventh Circuit *explicitly* ruled that the *tariff* (*not* a quoted rate) was "not plain to the ordinary user". 794 F.2d at 637. That ruling was the basis for determining that undercharges could not be collected for the time period during which the shipper and the carrier agreed that the lower of the two rates provided in the tariff should apply. Through semantic sleight of hand Petitioner suggests that the *Seaboard* ruling was not based upon an unclear tariff. A reference to the opinion itself resolves that question. *See*, 794 F.2d at 635 ("The controversy reflects a somewhat unclear published tariff.")

Interestingly enough, the *Seaboard* opinion does not disallow collection of the undercharges after the carrier notified the shipper that a higher rate would apply. In fact, the Eleventh Circuit affirmed a ruling in favor of the carrier for recovery of undercharges for the time period following notification of the increased rate. That decision is entirely consistent with the Filed Rate Doctrine. Once the shipper had clear notice that a higher rate was actually applicable under the tariff, the shipper had to pay the higher rate. Prior to that date, the shipper did not have notice of the higher rate, because the tariff was "unclear".

Thus, *Seaboard* involved the application of one of two rates out of a tariff. The applicable rate could not clearly be determined. Petitioner instead suggests that an unpublished, private agreement as to rate should prevail over the filed rate. *Seaboard* did not so rule, and in fact, ruled quite to the contrary by requiring payment of the filed rate after notice was given to the shipper of a higher applicable rate.

6. *Western Pacific* Consistent with Decision Below

Petitioner's reliance on *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956) is misplaced. This Court's decision in *Western Pacific* is consistent with the Fifth Circuit decision.

The doctrine of primary jurisdiction did require referral to the ICC of certain issues in *Western Pacific*. The Court there faced a commodity (steel casings with napalm gel but lacking bursters or fuses) which did not appear in any tariff. Two similar commodities did appear in tariff schedules. To determine whether the steel casings should be rated as "incendiary bombs" or "gasoline in steel casings" required a review of the underlying cost and risk allocation factors which justified each rate. 77 S.Ct. at 168. That determination was sufficiently technical to require resort to the ICC's expertise.

On the other hand, Petitioner asserts that a negotiated rate should prevail over an undisputed, clear tariff. This Court only found primary jurisdiction applicable in *Western Pacific* based on the technical issues. Petitioner presents no technical issues. The decision below, consistent with this Court's other opinions, found as it did because no technical issue was raised. Thus, the Fifth Circuit's opinion conforms to this Court's precedent in *Western Pacific* and the numerous other cases cited herein.

7. Cases Omitted by Petitioner

In requesting certiorari, Petitioner failed to direct the court's attention to some highly relevant decisions. The

Commercial Metals decision cited above was not mentioned in Petitioner's brief. In *Commercial Metals,* this court held that the "carrier has not only the right but also the duty to recover its proper charges for services performed." 102 S.Ct. at 1821. Trustee here seeks only to comply with that duty.

Likewise, Petitioner failed to mention the decision in *Regular Common Carrier Conference, et al. v. United States,* 793 F.2d 376 (D.C.Cir. 1986). In that case, the D.C. Circuit, consistently with all the other circuits, found that the Filed Rate Doctrine stands supreme. Justice Scalia, author of the opinion, stated, in pertinent part, as follows:

> Even without any clear textual indication, it would be doubtful whether the waiver provision of § 10762 could be used so expansively as to nullify this § 10761 requirement for a "rate . . . contained in a tariff". That requirement is utterly central to the act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory (citation omitted) and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates (citation omitted). The matter is placed beyond all doubt, however, by the fact that 10761 contains its own waiver provision, authorizing the Commission to "grant relief from subsection (a) of this section" only "to contract carriers." (Citation omitted.) That explicit limitation would be meaningless if the Commission could effectively dispense with the requirement for a "rate . . . contained in a tariff" by unlimited dilution of the "general tariff requirements" under § 10762.

Regular Common Carrier Conference, 793 F.2d at 379. Petitioner would allow unlimited, after-the-fact dilution of the tariff filing requirements. If the ICC determines, on a

case-by-case basis, that collection of the filed rate would be "unreasonable", then the requirement of a "rate . . . contained in a tariff" would be rendered meaningless.

Even more basic is the language quoted by Justice Scalia. Relief from the Filed Rate Doctrine can *only* be granted for contract carriage. 793 F.2d at 379. Petitioner instead seeks authority for the ICC to grant *ex post facto* relief from the Filed Rate Doctrine.

The lesson from *Regular Common Carriers* is quite simple. A negotiated rate cannot be enforced. The ICC cannot lawfully enforce a private agreement which varies from a published tariff. "Reasonability" is not material since all parties knew, or were legally held to know, the lawful rate from the start.

C. Government Exemption Claim Unavailing

Petitioner also asks this court to review the Fifth Circuit ruling rejecting the untimely claim of government exemption. Petitioner offers no legal support for its argument, except to state that the conclusion is wrong.

Petitioner failed to raise the government exemption argument before its Motion for Reconsideration. The rules of procedure as promulgated by this court are quite explicit on the use of reconsideration. Under Federal Rules of Civil Procedure 59, a party may obtain reconsideration of issues improvidently ruled or arguments based on newly discovered evidence. *Johnson v. Heckler*, 607 F.Supp. 875 (N.D.Ill. 1984). That authority does not extend, however, to raising new issues not previously pled or briefed.

Petitioner had not properly raised the issue, and, in fact, had waived the issue. *Jensen v. Conrad*, 570 F.Supp. 114 (D.S.C. 1983), *cert. denied*, 470 U.S. 1052, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985) (refusal to alter Summary Judgment because evidence could have been timely submitted but was not so submitted); *Thermo King Corporation v. Strick Corporation*, 467 F.Supp. 75 (W.D.Pa.), *aff'd* 609 F.2d 503 (3rd Cir. 1979) (Summary Judgment for Plaintiff could not be disturbed – Defendant not allowed to shift ground on position regarding determinative value of warranty). As the District Court stated in its opinion on the Motion for Reconsideration, by choosing to withhold this legal theory, Petitioner is bound by its own tactics. *Frito-Lay of Puerto Rico, Inc. v. Canas*, 92 F.R.D. 384, 391 (D.P.R. 1981).

Petitioner cites no conflict among the circuits on this issue. Instead, Petitioner attempts, apparently, to rely upon some notion of plain error. Petitioner, however, cites no authority for the granting of certiorari to review such a ruling.

Furthermore, the district court ruling on this matter was made in the alternative. The district court did consider the merits and found against Petitioner on the merits. *See, Order Denying Reconsideration*, March 4, 1988, Buchmeyer, J., found at Appendix C-1 of Petitioner's Brief. Petitioner fails to address or attack that ruling.

CONCLUSION

Petitioner stops short of arguing, though clearly hints, that application of the Filed Rate Doctrine would

be unfair. That may or may not be so, however, this court should not change the doctrine which has been so long established. It is "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil and Gas*, 285 U.S. 393, 406, 5 S.Ct. 443, 447, 76 L.Ed. 815 (1932), quoted in *Square D*, 106 S.Ct. at 1931.

The Filed Rate Doctrine as enacted by Congress and as confirmed by this court requires the carrier to charge and collect the filed rate. No more and no less may be collected. The carrier is under a legal obligation to collect that rate. *No act or omission of the carrier* (even "unreasonable practices") can estop it from collecting the full tariff charges. *Miller v. Ideal Cement Co.*, 214 F.Supp. 717, 720, (D.Wyo. 1963), citing *Empire Petroleum Co. v. Sinclair Pipeline Co.*, 282 F.2d 913 (10th Cir. 1960). "No oral contracts or agreements may supersede or vary the tariff." *Miller*, 214 F.Supp. at 720, citing *A.,T. & S.F. Ry Co. v. Robinson*, 233 U.S. 173, 34 S.Ct. 556, 58 L.Ed. 90 (1914). Yet Petitioner seeks to vary the charges by oral agreement, after-the-fact, under the cloak of "unreasonableness". The carefully constructed regulatory environment cannot be undermined by oral agreements. That is precisely what Petitioner requests. But that is precisely what Congress forbade by enacting the Filed Rate Doctrine.

"The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Square D*, 106 S.Ct. at 1926, quoting Brandeis, J in *Keogh v. Chi. & N.W.R. Co.*, 260 U.S. 156, 43 S.Ct. 47, 49 (1922). Petitioner's assertion that Caravan acted "unreasonably" is nothing more than an attempted assertion of a species of tort based on misrepresentation or fraud. Decades old,

unwavering precedent and statute mandate that Petitioner's Arguments and Petition for Writ of Certiorari be denied.

Respectfully submitted,

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